GOH SEH HO

v.

TANAVANUS SDN. BHD. & ORS.

HIGH COURT BORNEO
SYED AHMAD IDID JC
[ORIGINATING SUMMONS NO. K. 24 OF 1990]
11 NOVEMBER 1991

CIVIL PROCEDURE: *Multiplicity of Actions - Specific relief - Injunctions - Objectives - Preventive relief.*

The plaintiff, 2nd and 3rd defendants were directors and shareholders of the 1st defendant. The plaintiff ceased to be a director at the time this originating summons was taken out.

The 2nd and 3rd defendants are the registered owners of Native Title No. 013087806 and Native Title No. 01309778 respectively.

On 5 June 1982 2nd defendant executed a declaration of trust making the plaintiff beneficiary of ½ undivided share under Native Title No. 013087806 which the 2nd defendant would hold and undertake to transfer to such person or persons as the plaintiff directs or appoints.

On 7 March 1983 the 1st and 2nd defendants executed an agreement wherein the latter allowed the former to enter the abovesaid land for the purpose of quarrying, production and sale of rocks and stones. On the same day the 1st and 2nd defendants had executed a trust deed appointing the latter as Trustee of the former for the purpose of entering into a sublease agreement with the 3rd defendant in respect of his land held under Native Title No. 01309778.

The 1st, 2nd and 3rd defendants applied for an order to strike out the originating summons under O. 18 r. 19 of the Rules of High Court 1980 by way of summons in chambers supported by the 2nd defendant's affidavit.

The originating summons in question had prayed for the following:

(a) a declaration that the agreement dated 7 March 1983 between the 2nd defendant and the 1st defendant in respect of parcel of land under Native Title No. 013087806 at Kampung Karambunai in the District of Kota Kinabalu was illegal and null and void by virtue of ss. 17 and 64 of the Land Ordinance (Cap. 68);

(b) a declaration that the agreement entered into between the 2nd defendant and the 3rd defendant pursuant to the trust deed dated 7 March 1983 in respect of a parcel of land held under Native Title No. 01309776 at Kampung Karambunai in the District of Kota Kinabalu was illegal and null and void by virtue of ss. 17 and 64 of the Land Ordinance (Cap. 68);

(c) and injunction to restrain the 1st defendant by its directors, servants or agents or howsoever from entering the two parcels of land held under Native Titles Nos. 013087806 and 01309778 for the purpose of carrying out the operations of quarrying, production and sale of rocks of the two parcels of land; and

(d) costs; and

(e) further or other relief.

Held:

[1] The Court is of the view that redress should be sought in one forum or Court and multiplicity of actions is not to be encouraged. In view of the fact that there is a pending suit *vide* K. 84 of 1989 between the plaintiff and the 2nd defendant, the Court feels it would be sufficient for the plaintiff to exercise whatever rights he may have at the hearing of that suit.

[2] The evidence points to the fact that the agreement dated 7 March 1983 between the 1st and 2nd defendants was legal by virtue of the subject matter not being a "dealing" within the purview of s. 17(1) of the Sabah Land Ordinance.

Furthermore the plaintiff failed to prove he suffered injury by the defendants.

[3] In respect of the prayer for an injunction, the Court declined to grant the injunction as there was nothing to injunct. In view of the fact that the agreement and trust deed in question had already expired.

Furthermore an injunction is a preventive relief and the criterion governing the granting of one depends on whether the plaintiff will suffer irrepairable damage - In this instance plaintiff had not suffered any damages as the objective of the injunction had been exhausted and no longer existed.

[Order in terms of application granted with costs.]

Cases referred to:

American Cyanamid Co. v. Ethicon Ltd. [1975] 1 All ER 504 ***(cons)***
Wah Loong (Jelapang) Tin Mine Sdn. Bhd. v. Chia Ngen Yiok [1975] 2 MLJ 109 ***(cons)***
Lian Keow Sdn. Bhd. & Anor. v. Overseas Credit Finance (M) Bhd. & Anor. [1982] 2 MLJ 162 ***(cit)***
Tan Sri Haji Othman Saat v. Mohamed Bin Ismail [1982] 2 MLJ 177 ***(cons)***
Edwards & Anor. v. Halliwell & Ors. [1950] 2 All ER 1064 ***(cons)***
Palaniappa Chettiar v. Arunasalam Chettiar (PC) [1962] 28 MLJ 143 ***(cons)***
Low Kum Yoon v Tah Kim Huah [1979] 1 MLJ 83 ***(dist)***
Douglas A Pedley v. Majlis Ugama Islam Pulau Pinang & Anor. [1990] 2 CLJ (Rep) 24 ***(dist)***
Borneo Housing Mortgage Finance Bhd. v. Bank Bumiputra (M) Bhd [1991] 2 MLJ 261 ***(foll)***

Legislation referred to:

Land Ordinance (Cap 68) (Sabah), ss. 4, 17, 64, 88, 95
Specific Relief Act 1950, s. 41

For the plaintiff - Sugumar Balakrishnan; M/s. Sugumar & Co.
For the defendant - Chong Kah Kiat; M/s. Shelley Yap Leong Tseu Chong Chia & Co.

JUDGMENT

Syed Ahmad Idid JC:

The 1st, 2nd and 3rd defendants in their summons-in-chambers application asked for an order to strike out the originating summons under O. 18 r. 19 of the Rules of High Court 1980. The application was grounded on the affidavit of Lim Chooi Keng, the 2nd defendant.

The originating summons had asked for the following:

(a) a declaration that the agreement dated 7 March 1983 between the 2nd defendant and the 1st defendant in respect of a parcel of land under Native Title No. 013087806 at Kampung Karambunai in the District of Kota Kinabalu was illegal and null and void by virtue of ss. 17 and 64 of the Land Ordinance (Cap. 68):

(b) a declaration that the agreement entered into between the 2nd defendant and the 3rd defendant pursuant to the trust deed dated 7 March 1983 in respect of a parcel of land held under Native Title No. 01309778 at Kampung Karambunai in the District of Kota Kinabalu was illegal and null and void by virtue of s. 17 and 64 of the Land Ordinance (Cap.68):

(c) an injunction to restrain the 1st defendant by its directors servants or agents or howsoever from entering the two parcels of land held under Native Title No. 013087806 and 01309778 for the purpose of carrying out the operations of quarrying and production and sale of rocks of the two parcels of land, and

(d) costs; and

(e) further or other relief.

Facts

The plaintiff, 2nd and 3rd defendant were directors and shareholders of the 1st defendant: the plaintiff ceased to be a director of 1st defendant when he took out this originating summons.

2nd defendant is the registered owner of Native Title No. 013087806. 3rd defendant is the registered owner of Native Title No. 01309778.

The 2nd defendant executed a declaration of trust on 5 June 1982 declaring that the plaintiff was the beneficiary to the extent of ½ undivided share in the property under Native Title no. 013087806 and declaring that he would hold the share for the plaintiff and further undertaking to transfer it to such person or persons as the plaintiff directs or appoints: (Exh. 'A' , plaintiff's affidavit of 23 March 1990).

By an agreement dated 7 March 1983 between the 1st defendant and the 2nd defendant, the 2nd defendant agreed to let the 1st defendant enter the land under Native Title 013087806 for the purpose of quarrying, production and sale of rocks and stones: (Exh. 'B', plaintiff's affidavit of 23 March 1990).

The 1st defendants (a company) and the 2nd defendant had separately on 7 March 1983 executed a trust deed appointing the 2nd defendant trustee of the 1st defendants for the purpose of entering into a sublease agreement with the 3rd defendant in respect of the 3rd defendant's land under Native Title No. 01309778: (para. 16 and Exh. 'F' of plaintiff's affidavit of 23 March 1990).

Contention

It was clear from the evidence before me that plaintiff's major dissatisfaction was against the 2nd defendant particularly on his inability to sell his ½ share of Native Title No. 013087806 (see Exh. 'C'). I had been addressed that on 29 March 1989, the plaintiff took out a civil suit under Suit No. K. 84 of 1989 against the 2nd defendant claiming damages for breach of trust and seeking:

(a) a declaration that ½ undivided share in the land held under Native Title No. 013087806 was held by the 2nd defendant in trust for him:

(b) an injunction to restrain the 2nd defendant from selling, disposing or charging the 1/2 undivided share to any person unless instructed by him: and

(c) an order that the 2nd defendant instructs the Development & Commercial Bank, Kota Kinabalu to release the Native Title Deed No. 013087806 to the plaintiff's solicitors to enable the plaintiff to transfer the ½ undivided share to Chong Siew Jin @ Rose Chong Siew Jin.

That suit is pending. I am of the opinion that it should be sufficient for plaintiff to exercise whatever rights he may have under the circumstances at the hearing of that suit. People who seek redress are encouraged to take the appropriate action in one forum or Court rather than do so in diverse or staccato forms as appears to be the case here. Plaintiff should have addressed all his problems or claims in either K. 24 of 1990 or in the earlier suit K. 84 of 1989.

It was interesting to note that the plaintiff, as a director of 1st defendant himself, had signed both the agreement and the trust deed (between 1st and 2nd defendant). He chaired the meeting on 15 January 1983 which resolved to change the name of Crush Sdn. Bhd. to Tanavanus Sdn. Bhd. (1st defendants) while the other party, the 2nd defendant here, remained as Lim Chooi Keng. He also accepted the terms of the credit facility of RM600,000 given by Development & Commercial Bank dated 12 January 1984 and agreed to the NT. 013090778 and NT. 013087806 (the land in dispute here) being charged in the same letter of offer and acceptance.

Injunction:

While Mr. Chong Kah Kiat, of Counsel for all the three defendants, argued on "interlocutory" injunctions and why such should not be granted to plaintiff, Mr. Sugumar Balakrishnan urged the Court to grant a "final" injunction. On the facts such as we have the 2nd defendant and 1st defendant entered into the;

(i) agreement and

(ii) the trust deed both effective for eight years from 7 March 1983. Both had therefore expired on 6 March 1991 about eight months ago.

The Court mindful of the decisions in *American Cyanamid Co. v. Ethicon Ltd.* [1975] 1 ALL ER 504: *Wah Loong (Jelapang) Tin Mine Sdn. Bhd. v. Chia Ngen Yiok* [1975] 2 MLJ 109: and *Lian Keow Sdn. Bhd. & Anor. v. Overseas Credit Finance (M) Bhd. & Anor* [1982] 2 MLJ 162 and accepting the fact that the agreement and the trust deed had expired some eight months ago, must decline to grant the injunction. There is nothing more to injunct. Simultaneously the law is clear: an injunction is a preventive relief and the principles which govern the grant or refusal of an injunction include whether the plaintiff will suffer irrepairable damage. In our case it was clear that the plaintiff has not suffered any damage as the objective of the injunction has been exhausted and is no longer in existence.

Declarations

Whether plaintiff is entitled to either or both. The judgment in *Tan Sri Haji Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177, *Edwards & Anor. v. Halliwell & Ors.* [1950] 2 ALL ER 1064 and *Palaniappa Chettiar v. Arunasalam Chettiar (PC)* [1962] 28 MLJ 143 had been canvassed and noted. I cannot say that plaintiff's application for the declaration was only to raise question of academic interest (cf: *Low Kum Yoon v. Teh Kim Huah* [1979] 1 MLJ 83 and *Douglas A Pedley v. Majlis Ugama Islam Pulau Pinang & Anor.* [1990] 2 CLJ (Rep) 24]. There is O. 15 r. 16 of the Rules of the High Court 1980 which empowers the Court to make binding declarations. It is however pertinent to observe that, while the power to make

declaratory judgment is discretionary, such power must be judicially exercised and where, as in our case, the event is passed, a declaration need not be granted. Additionally, the Court shall not make any declaration where the plaintiff, being able to seek further relief than a mere declaration or title omits to do so. See s. 41, Specific Relief Act 1950. In our instant case, the plaintiff had earlier filed a suit against the 2nd defendant in K. 84 of 1989. That should suffice. Multiplicity of actions is not to be encouraged. Parties should consider seriously all the factors before they decide on the course of legal action and then take an appropriate action to cover all facets of their claims.

The evidence, such as we have, shows that the agreement dated 7 March 1985 between 2nd and 1st defendants was not all illegal on two grounds:

(i) The subject matter, that is quarrying for stones, is not a "dealing" within the meaning of s. 17 (1) of the Sabah Land Ordinance. The "quarrying of land" does not require to be registered. "Dealing" as defined in s. 4 means any transaction or instrument capable of registration within the Ordinance. It would have been otherwise if the agreemnet had been one of sale and purchase. Looking at s. 88 it is manifest that:

> No new title and no dealing with, claim to or interest in any land shall be valid until it has been registered in accordance with the provisions of this part.

And by s. 95:

> All dealings shall be registered in the office in which the title concerned is registered.

(ii) The plaintiff did not prove that he was injured by the defendants. In fact he signed the agreement on behalf of 1st defendants whilst he was their director. While he did not come to Court with clean hands (as he did not divulge the fact of such signing in his affidavits) it was noble that he came to cleanse his sins.

It was clearly borne out that both 2nd and 3rd defendants who signed the sublease agreement in respect of the Native Title No. 01309778 were and are natives. The case of *Borneo Housing Mortgage Finance Bhd. v. Bank Bumiputra (M) Bhd.* [1991] 2 MLJ 261 was cited in support. The subject matter of the sublease agreement was also similar to that in the agreement, that is quarrying of stones.

On the evidence adduced in affidavits and the law so far cited (which I have ventilated above together with the reasons), it is manifest that the plaintiff's application for the declarations and the injunctions is not maintainable. The justice of the matter may be satisfied at the hearing of the Suit K. 84 of 1989. I hope this will be heard early. I now grant an order in terms of the defendants' summons-in-chambers dated 28 December 1990 with costs. Order accordingly.

Also found at [1992] 2 CLJ 1005